

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DAKOTA S. SMITH,

Defendant.

4:20-CR-3085

ORDER

As counsel are no doubt aware, since 2013 this Court has employed a modified framework in determining a sentencing "Guidelines" range in non-production child pornography cases, based on the Court's categorical, policy-based determination that [U.S.S.G. § 2G2.2](#) should be afforded less weight in the sentencing process due to outdated enhancements that fail to carefully differentiate between offenders based on their culpability and dangerousness. See [United States v. Abraham](#), 944 F. Supp. 2d 723 (D. Neb. 2013). The Court did so based in part on a 2012 report issued by the Sentencing Commission that catalogued the deficiencies of § 2G2.2. United States Sentencing Commission, *Report to the Congress: Federal Child Pornography Offenses* (Dec. 2012), available at: <https://bit.ly/3lUbXsN> (last accessed August 12, 2021).

Other courts have since reached similar conclusions. See, e.g., [United States v. Darby](#), No. 2:16CR36, 2017 WL 1135612, at *2 (E.D. Va. Mar. 27, 2017), *aff'd*, 721 F. App'x 304 (4th Cir.); *cert. denied*, 139 S. Ct. 275 (2018); [United States v. R.V.](#), 157 F. Supp. 3d 207, 210-12 (E.D.N.Y. 2016); [United States v. Klear](#), 3 F. Supp. 3d 1298 (M.D. Ala. 2014). And this case exemplifies the issue: while there are some factual distinctions (as is true with all cases),

the presentence report describes a relatively mine-run offense that has nonetheless resulted in a Guidelines calculation of a 151-188 month sentence.

The Sentencing Commission has since updated its work. United States Sentencing Commission, *Federal Sentencing of Child Pornography: Non-Production Offenses*, available at: <https://bit.ly/37DIZoI> (last accessed August 12, 2021). The Court will do the same: having criticized § 2G2.2 for being outdated, it's incumbent on the Court to ensure it doesn't make the same mistake. But before announcing a rule that the Court intends to apply going forward, and because of their institutional interests, it's appropriate to seek input of experienced and capable counsel from the United States Attorney's Office and the Federal Public Defender's Office. Accordingly,

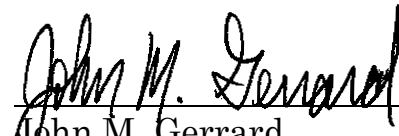
IT IS ORDERED:

1. The proposals to the probation office, motions to the Court, and sentencing statements described in Paragraph 6 of the Court's Order on Sentencing Schedule [41] shall be filed on or before September 13, 2021.
2. The parties shall address, by brief, the Sentencing Commission's 2021 report and other relevant authority regarding an appropriate framework for evaluating the relative culpability and dangerousness of non-production child pornography offenders during the sentencing process.
3. The Court's tentative sentencing findings shall be filed on or before September 20, 2021.

4. Sentencing in this matter is continued to October 8, 2021 at 11:00 a.m. in Courtroom 1, Robert V. Denney Federal Building, 100 Centennial Mall North, Lincoln, Nebraska before Judge John. M. Gerrard.

Dated this 12th day of August, 2021.

BY THE COURT:



John M. Gerrard
United States District Judge